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No. 04-820

IN THE

Supreme Court of the United States

COLONEL CLIFFORD ACREE, *et al.*,
Petitioners,

v.

REPUBLIC OF IRAQ, *et al.*,

and

UNITED STATES OF AMERICA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE WASHINGTON LEGAL FOUNDATION; U.S. SENATORS GEORGE ALLEN, TOM HARKIN, PATTY MURRAY; U.S. REPRESENTATIVES ROSCOE BARTLETT, HOWARD L. BERMAN, JOHN CONYERS, JR., ELIJAH E. CUMMINGS, BOB FILNER, VIRGIL H. GOODE, JR., BART GORDON, KATHERINE HARRIS, SHEILA JACKSON-LEE, JAMES McGOVERN, GREGORY W. MEEKS, MAJOR R. OWENS, CHARLES B. RANGEL, SILVESTRE REYES, JIM SAXTON, TED STRICKLAND, AND LYNN WOOLSEY AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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Pursuant to Rule 37.2 of the Rules of this Court, the Washington Legal Foundation (WLF) and a bipartisan group of distinguished United States Senators and Representatives respectfully move for leave to file the attached brief as

amici curiae in support of petitioners, Colonel Clifford Acree, *et al.* Consent to file this brief has been obtained from the petitioners and respondent United States of America. However, consent has not been obtained from respondents Republic of Iraq, *et al.*, who failed to make any appearance in this case in the courts below, thereby necessitating the filing of this motion.

WLF is a national non-profit public interest law and policy center based in Washington, D.C., with supporters nationwide. WLF regularly appears in this Court and lower federal courts as *amici curiae* supporting a strong national security and defense. WLF also served as counsel in the court of appeals below to several Members of Congress who appeared as *amici curiae* supporting the petitioners.

United States Senator George Allen (R-VA) serves on the Senate Foreign Relations Committee and chairs the Subcommmittee on Europe. Senator Tom Harkin (D-IA) serves on the Defense Subcommittee of the Senate Appropriations Committee. Senator Patty Murray (D-WA) serves on the Senate Veteran Affairs Committee.

United States Representative Roscoe Bartlett (R, MD-06) serves on the House Armed Services Committee, the Subcommittee on Terrorism, Unconventional Threats and Capabilities, and Chairs the Projection Forces Subcommittee. Rep. Howard L. Berman (D, CA-28) is the Minority At-Large Whip and serves on the House International Relations and Judiciary Committees. Rep. John Conyers, Jr. (D, MI-14) is the Ranking Member on the House Judiciary Committee. Rep. Elijah E. Cummings (D, MD-07) serves on the House Government Reform and Joint Economic Committees.

Rep. Bob Filner (D, CA-51) serves on the House Committee on Veterans Affairs. Rep. Virgil H. Goode, Jr. (R, VA-05) serves on the House Appropriations Committee. Rep. Bart Gordon (D, TN-06) is the Ranking Member of the House Science Committee. Rep. Katherine Harris (R, FL-13) serves on the House International Relations Committee. Rep. Sheila Jackson-Lee (D, TX-18) serves on the House Judiciary Committee and the House Select Committee for Homeland Security. Rep. James McGovern (D, MA-03) serves on the House Rules Committee.

Rep. Gregory W. Meeks (D, NY-06) serves on the House International Relations Committee. Rep. Major. R. Owens (D, NY-11) serves on the Government Reform Committee. Rep. Charles B. Rangel (D, NY-15) is the Ranking Member of the House Ways and Means Committee. Rep. Silvestre Reyes (D, TX-16) serves on the House Armed Services Committee.

Rep. Jim Saxton (R, NJ-03) is the Chair of the Terrorism, Unconventional Threats and Capabilities Subcommittee for the House Armed Services Committee. Rep. Saxton sponsored the Flatow Amendment to the Foreign Sovereign Immunities Act (FSIA), a key provision which is relevant to this case. Rep. Ted Strickland (D, OH-06) serves on the House Committee on Veterans Affairs. Rep. Lynn Woolsey (D, CA-06) serves on the Subcommittee on Energy for the House Science Committee.

The district court found the Republic of Iraq defendants civilly liable under the FSIA for the extreme acts of torture inflicted upon petitioners Colonel Clifford Acree, *et al.*, while they were held as Prisoners of War (POW) by Saddam Hussein's regime during the 1991 Gulf War, and

awarded both compensatory and punitive damages. *Acree v. Republic of Iraq*, 271 F. Supp. 2d 179 (D.D.C. 2003).

In the court of appeals, Senators Allen and Murray, and Representatives Berman, Conyers, and Meeks, appeared as *amici curiae*. Represented by WLF, they successfully argued that Section 1503 of the Emergency Wartime Supplemental Appropriations Act of 2003, designed to help rebuild Iraq, was not intended by Congress to make the torture exception of the FSIA inapplicable to Iraq. *Acree v. Republic of Iraq*, 370 F.3d 41, 57 (D.C. Cir. 2004). Nevertheless, the court of appeals vacated the judgment of the district court, ruling *sua sponte* that the torture victims "failed to state a cause of action." *Id.* at 60.

The court of appeals' judgment calls into serious question the viability of Congress's efforts to punish *and* deter states that sponsor terrorism and torture American citizens, including its servicemen, by making those countries civilly liable for the resultant injuries. The punishment and deterrence of state-sponsored terrorism are clearly issues of vital national importance. Those policy goals are seriously and immediately jeopardized by the court of appeals' judgment.

Congress repeatedly and consistently expressed its outrage over the brutal treatment of the petitioners by Iraq, and expressed its intent to combat the torture, hostage taking, and killing of American citizens. Since 1996, Congress has passed a series of laws aimed at stemming the rise in terrorist attacks against Americans through public, legal accountability. It is Congress's express desire that these laws, and the judgments rendered thereunder, be enforced. This objective will be seriously compromised

should the judgment of the court of appeals stand. The ruling below thus directly affects *amici*'s legislative interests and severely undercuts the right of Americans, including American POWs, to hold a foreign state liable for personal injuries caused by specific acts of torture and terrorism. Accordingly, *amici* support the POW petitioners and their families and urge this Court to grant their petition.

The petition presents two questions for review: (1) "Does a U.S. citizen who has been tortured by a state sponsor of terrorism have a cause of action against the foreign sovereign under either state or federal law?" and (2) "Does a U.S. citizen who has been tortured by a state sponsor of terror have a cause of action for violation of universally accepted international legal norms against torture?" Pet. at i. While both questions warrant review, particularly in light of this Court's recent decision in *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739 (2004), *amici* will focus their brief on the first question presented. The second question will be addressed in greater detail by the Center for Justice & Accountability in a separate *amicus* brief.

For the foregoing reasons, WLF and the bipartisan group of Members of Congress respectfully request that their motion to file the attached brief be granted.

Respectfully submitted,

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Date: March 21, 2005

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INTERESTS OF *AMICI CURIAE*

The interests of *amici curiae* are set forth in the motion accompanying this brief.[1]

[1] Pursuant to Rule 37.6, *amici* state that no counsel for a party authored any part of this brief, and no person or entity other than

INTRODUCTION AND SUMMARY OF ARGUMENT

In the interests of judicial economy, *amici* adopt by reference the Statement of the Case as presented by the petitioners. Pet. at 1-8. In brief, petitioners are 17 current and former United States servicemen and certain of their family members. The servicemen were held as POWs during the 1991 Gulf War with Iraq by Saddam Hussein's regime and were brutally beaten, tortured, and starved in clear violation of United States and international law.[2]

Petitioners filed suit in the U.S. District Court for the District of Columbia against the Republic of Iraq, the Iraqi Intelligence Service, and Saddam Hussein in his official capacity for specific acts of torture that constituted common law torts of assault, battery, and intentional infliction of emotional distress. The petitioners based their

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amici or their counsel made a monetary contribution to the preparation or submission of this brief.

[2] The horrific acts of torture carried out by the defendants are briefly summarized by the petitioners (Pet. at 3) and more fully recounted by the district court in its opinion. *Acree v. Republic of Iraq*, 271 F. Supp. 2d 179 (D.D.C. 2003); Pet. App. C at 70a-131a. The torture included electric shocks, whipping, severe beatings resulting in broken bones, including a fractured skull, and starvation so extreme that petitioner Colonel Acree was compelled to find nourishment from eating "the scabs off his own body" and "a small piece of soiled bread he found behind the toilet" in his freezing and filthy cell. *Id.* at 186; Pet. App. C at 72a. Both the Senate and the House swiftly and strongly condemned Iraq for its illegal and brutal treatment of American POWs. H.R. Con. Res. 48, 102d Cong. (1991); S. Con. Res. 5, 102d Cong. (1991); S. Con. Res. 8, 102d Cong. (1991).

claims on four sources of law: 1) state common law of torts applicable to the defendants under 28 U.S.C. § 1606 which provides that a "foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances"; 2) the Antiterrorism and Effective Death Penalty Act of 1996, including 28 U.S.C. § 1605(a)(7), which amended the Foreign Sovereign Immunities Act (FSIA) to make state sponsors of terrorism civilly liable for their acts; 3) the "Flatow Amendment" (codified at 28 U.S.C. § 1605 note) which provides a cause of action against agents and officials who carry out acts of torture; and 4) the application of *respondeat superior* principles through the liability creating provisions of 28 U.S.C. § 1606. *See* Pet. at 4.

The Iraqi defendants defaulted, and after a full review of the facts and the law, the district court entered judgment in favor of the petitioners.[3] The United States subsequently moved to intervene, arguing only that a recent appropriation measure, Section 1503 of the Emergency Wartime Supplemental Appropriations Act of 2003 (EWSAA), Pub. L. No. 108-11, 117 Stat. 559, and a related Presidential determination, had divested the district court of subject matter jurisdiction. The United States did not otherwise argue or assert that the petitioners had failed to state valid causes of action.

On appeal, a divided panel ruled against the United

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[3] The Iraqi defendants had previously ignored several efforts to submit the dispute to international arbitration under accepted international rules of arbitration. Pet. at 5. The offer to arbitrate is a prerequisite to filing a claim against a foreign sovereign for torture in federal court. 28 U.S.C. § 1605(a)(7)(B)(i).

States on the Section 1503 issue, finding that Congress did *not* intend to divest the district court of subject matter jurisdiction to hear and adjudicate petitioners' claim, as several congressional *amici* had argued. *Acree v. Republic of Iraq*, 370 F.3d 41, 57 (D.C. Cir. 2004); Pet. at 31a. Nevertheless, the court of appeals dismissed the action (with Circuit Judge Roberts concurring only in the judgment) by ruling *sua sponte* on an issue neither raised nor briefed by either party: the court held that despite petitioners' detailed allegations and the district court's lengthy findings of acts of *torture* -- which clearly constitute common law *torts* of assault, battery, and intentional infliction of emotional distress -- petitioners "failed to state a cause of action." *Id.* at 60; Pet. at 39a. In short, the petitioners won the battle but lost the war.

In dismissing the action, the court of appeals relied upon its earlier decision in *Cicippio-Puleo v. Islamic Republic of Iran*, 353 F.3d 1024 (D.C. Cir. 2004) where it held that neither 28 U.S.C. § 1605(a)(7) nor the Flatow Amendment, nor a combination of the two, were sources of a cause of action against state sponsors of terrorism. Inexplicably, the *Acree* court of appeals was silent about the applicability of 28 U.S.C. § 1606, a provision of FSIA which indisputably imposes liability on certain designated foreign countries, through the operation of Section 1605(a)(7) and the Flatow Amendment, for acts of terrorism and torture that constitute common law torts. Even if *Cicippio-Puleo* were correctly decided, which *amici* submit is not the case, the Court ignored both the independent state common law bases for a cause of action and the *respondeat superior* liability of Iraq.

REASONS FOR GRANTING THE PETITION

As the petitioners have amply demonstrated, their petition should be granted because, *inter alia*, the judgment below conflicts with the Court's precedents, conflicts with decisions from sister circuits, and calls for an exercise of the Court's supervisory powers. Pet. at 8-25; *see also* Sup. Ct. R. 10(a), 10(c).[4] While *amici* wholeheartedly agree that these reasons warrant this Court's review of the questions presented, *amici* wish to emphasize that review should be granted because the petition raises an important question of federal law of paramount concern to the Congress and the Nation as a whole. *See* Sup. Ct. R. 10(c). Indeed, this case is of unique importance because it was the first instance in which POWs who were tortured by a foreign state had obtained a judgment against the country responsible for their injuries.

WHETHER A U.S. CITIZEN WHO HAS BEEN TORTURED BY A STATE SPONSOR OF TERRORISM HAS A CAUSE OF ACTION AGAINST THE FOREIGN STATE IS AN IMPORTANT QUESTION OF FEDERAL LAW THAT SHOULD BE DECIDED BY THIS COURT

The judgment below calls into question the viability of Congress's efforts to punish and deter states that sponsor

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[4] Review by this Court is particularly warranted because, as the petitioners noted, the District of Columbia Circuit that rendered the judgment below is the circuit chosen by Congress as the venue in which almost all of these kind of cases are to be adjudicated. Pet. at 24 & n.9 (citing 28 U.S.C. § 1391(f)).

terrorism and torture American citizens, including its servicemen, by making those countries civilly liable for the resultant injuries. The punishment and deterrence of state-sponsored terrorism are clearly issues of vital national importance; those policy goals are seriously and immediately jeopardized by the court of appeals' judgment.

Under the Constitution, Congress has considerable and unquestionable authority to enact the legislation *sub judice* as well as sole power to regulate the jurisdiction of Article III courts. The erroneous interpretation by the court below of the relevant statutory provisions, and the court's crabbed reading of petitioners' Complaint alleging acts of torture (which more than satisfied general notice pleading standards), threatens to eviscerate Congress's efforts to allow American victims of state-sponsored terrorism to hold those countries liable for injuries in a federal court.

Accordingly, this Court should grant the petition and reverse the decision below. Indeed, as petitioners suggest, the lower court's judgment was so clearly erroneous that the Court should consider summarily granting the petition, vacating the judgment below, and remanding the case to the court of appeals with instructions to affirm the district court. *See* Pet. at 3.

A. United States Policy of Permitting Torture Victims To Hold States That Sponsor Terrorism Civilly Liable Is Undermined By The Judgment Below

The court of appeals' decision weakens an important weapon that Congress placed in the Nation's arsenal to fight the war on terrorism. Such a momentous and grave

decision raises a national issue of vital importance because it greatly diminishes the deterrent effect that Congress sought to create.

Equally troubling, the court of appeals, in its attempt to justify the dismissal of petitioners' case, expressed its own view of the "magnitude of [the] default judgment" and "its impact on the United States' conduct of foreign policy. . . ." 370 F.3d at 60; Pet. at App. 39a.[5] This blatant example of judicial interference in the conduct of foreign policy is both wrong and misguided. In another lawsuit by victims of Iraqi torture, *Daliberti v. Republic of Iraq*, 97 F. Supp. 2d 38 (D.D.C. 2000), the United States District Court for the District of Columbia refused to apply the Act of State doctrine and dismiss the lawsuit, stating:

> The designation of Iraq as a terrorist state was made by the Secretary of State on behalf of the Executive Branch under an express grant of authority by Congress. For this Court to grant defendant's motion to dismiss on act of state grounds would constitute more of a judicial interference in the announced foreign policy of the political branches of government than to allow the suit to proceed under the explicit authorization of Congress.

Id. at 55. So even on foreign policy grounds, the court got it wrong. Absolving those who torture American POWs of liability is prohibited by Article 131 of the Third Geneva

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[5] Lest there be any doubt, *amici* note that a ruling in favor of the petitioners would not interfere with rebuilding Iraq or cause the attachment of Iraqi assets needed for that effort. *See* Pet. App. G at 214a.

Convention, 75 U.N.T.S. 135 (the POW Convention), and encourages torture of American POWs in future wars. Large judgments against state sponsors of terrorism *further* United States foreign policy goals that such countries should be punished and deterred. If anything, the decision below will have the opposite effect. It will deter victims of torture from bringing suits of the type that Congress deliberately sought to encourage, and give aid and comfort to state sponsors of terrorism, including those that torture captured United States service personnel.[6]

Congress has consistently expressed its intent to hold foreign states civilly liable in federal courts for their acts that inflict physical injury and death upon Americans. *Amici* will first briefly list some of those enactments to underscore the grave importance of the issue, and then discuss some of their pertinent provisions in greater detail as they relate to this case.

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[6] The Islamic Republic of Iran is the most prolific state sponsor of terrorism according to the State Department. *See* U.S. DEP'T OF STATE, PATTERNS OF GLOBAL TERRORISM 2003 at 88 (2004). Iran has closely followed the development of the legislative scheme enacted by Congress to deter and punish state-sponsored terrorism and the resulting court cases. Members of Iran's Foreign Ministry have publicly vented their disagreement with Section 1605(a)(7) verdicts. *See* S. Jason Baletsa, *The Cost of Closure: A Reexamination of the Theory and Practice of the 1996 Amendments to the Foreign Sovereign Immunities Act*, 148 U. PA. L. REV. 1247, 1284 n.221 (2000). The immediate effect of this scheme has been to create a claim by the families of victims of Iranian terrorism upon hundreds of millions of dollars of Iranian assets frozen in the United States since 1979. While Iran may choose to ignore the trials and refuse to send defense counsel to appear, it cannot ignore the financial impact these judgments have upon its treasury.

1. In 1976, Congress enacted the Foreign Sovereign Immunities Act (FSIA), a provision of which, 28 U.S.C. § 1606, provides in pertinent part that a "foreign state *shall be liable* in the *same manner* and to the *same extent* as a private individual" if it has been stripped of its immunity under 28 U.S.C. § 1605 (emphasis added).

2. In April 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act. Section 221 of the Act expressly amended the FSIA by adding 28 U.S.C. § 1605(a)(7) to allow American victims to seek "money damages . . . against a foreign state" for personal injuries caused by acts of "torture," "hostage taking," and similar acts "if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency. . . ."

3. In October 1996, Congress enacted the Civil Liability for Acts of State Sponsored Terrorism Act, the so-called "Flatow Amendment." Pub. L. No. 104-208, 110 Stat. 3009 (1996) (codified at 28 U.S.C. § 1605 note). The Flatow Amendment provides that foreign officials and agents, "while acting within the scope of his or her office, employment, or agency, shall be liable" for torture and terrorism arising under Section 1605(a)(7). The Flatow Amendment also expands the scope of damages available to the victims to include punitive damages.[7]

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[7] This amendment was sponsored by *amicus* Representative Jim Saxton of New Jersey who referred to it as the "Flatow Amendment" in honor of Alisa Flatow, a 20-year-old Brandeis University student killed in 1996 by the Palestinian Islamic Jihad in a bus bombing while studying abroad in Israel. *See* Joseph W.

4. In 1998, Congress again amended the FSIA (Section 117 of the Treasury Appropriations Act of 1999) to provide that any property of a state sponsor of terrorism that was frozen could be subject to execution or attachment in aid of a judgment against that state pursuant to the FSIA. 28 U.S.C. § 1610(f)(1)(A).

5. In 2000, the Congress and the Administration agreed on legislation that would ensure access to the courts and blocked assets of a foreign state supporting terrorism. Section 2002 of the Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 2002, 114 Stat. 1464, provided for payment to a group of victims designated in the enactment who received funds directly from blocked assets, as well as assets linked to blocked assets.

6. The Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, Title II § 201, 116 Stat. 2337 (2002) (codified at 28 U.S.C. § 1610 note) provided that persons who possess final judgments from United States courts against foreign states pursuant to Section 1605(a)(7) may satisfy their judgments from the blocked assets of that party.

By enacting these broad and comprehensive measures, Congress made it abundantly clear that state sponsors of terrorism would be subject to civil liability by

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Dellapenna, *Civil Remedies for International Terrorism*, 12 DEPAUL BUS. L.J. 169, 256 n.439 (1999-2000); *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1 (D.D.C. 1998).

their victims to punish them and alter their behavior.[8] A closer examination of the pertinent provisions as they relate to the instant action demonstrates that the court of appeals clearly erred in dismissing this case.

1. *Section 1606 of FSIA*

The Congress could not have made it any clearer in Section 1606 of the FSIA when it provided for a cause of action against certain foreign states: a "foreign state not entitled to immunity under section 1605 . . . *shall be liable* in the *same manner* and to the *same extent* as a private individual under like circumstances . . . ." 28 U.S.C. § 1606 (emphasis added). Iraq was not entitled to immunity under Section 1605(a)(7) because it was then designated as a sponsor of terrorism and had tortured the petitioners. Ergo, Iraq was liable for the injuries it inflicted on petitioners "in the same manner" and to the "same extent" as would a private person. That should have been the beginning and the end of this case.

Remarkably, in dismissing petitioners' claims, the court of appeals completely ignored Section 1606 as well as this Court's precedent interpreting Section 1606 in the context of commercial suits against foreign states. In *First Nat'l. City Bank v. Banco Para el Comercio Exterior de*

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[8] This legislative scheme has borne fruit in the form of the recent billion dollar settlement with Libya for its role in the Pan Am 103 airline crash; awards of hundreds of millions of dollars in frozen Iranian assets to American victims of Iranian terrorism; and similar awards in frozen Cuban assets to American victims of Cuban terrorism. These cases thus serve as valuable precedent for holding a foreign country responsible for torturing and murdering Americans.

Cuba, 462 U.S. 611, 622 n.11 (1983), this Court stated that FSIA "requires the application" of "state law" against a foreign nation where such rule of liability would be used against a private party.[9]

Thus, in a FSIA suit against a foreign country, whether sounding in contract or tort, courts look to state law for rules of liability. Here, petitioners adequately alleged traditional common law claims for the torts of assault, battery, and intentional infliction of emotional distress.[10] Congress therefore need not have enacted any

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[9] As petitioners further note, Section 1606's liability creating language is nearly identical to that of the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2674, which similarly provides for a cause of action against the United States for certain torts committed by its agents, and where state law is chosen as the rule of liability. Pet. at 22. The absence of an express reference to state law in Section 1606 is of no moment, for 28 U.S.C. § 1652 provides that unless otherwise specified, state law "shall be regarded as rules of decision in civil actions" in federal courts. In short, as petitioners explained, the court below hopelessly confused choice of law questions with the issue of whether petitioners stated a cause of action. Pet. at 15, n.2.

[10] General notice pleading under Fed. R. Civ. P. 8 requires only that a "short and plain statement" of plaintiffs' claim be made. *Compare* Fed. R. Civ. P. 84 (the "Appendix of Forms are sufficient under the rules and are intended to indicate the simplicity and brevity of statement which the rules contemplate") *and* Form 9-Complaint for Negligence (sample claim for liability for negligence stated in conclusory sentence that "defendant negligently drove a motor vehicle against plaintiff who was then crossing said highway") *with* the detailed *pages* of claims of torture by petitioners that constitute intentional torts of assault, battery, and intentional infliction of emotional distress. Indeed, the petitioners filed a memorandum in the district court detailing four legal bases for cause of action, with a fifth under

additional provisions expressly providing for a "private right of action" in order for plaintiffs to vindicate their rights as the court of appeals mistakenly suggested below in relying on its flawed decision in *Cicippio-Puleo*.

2. *Section 1605(a)(7) of FSIA*

In 1996, Congress made it clear with the passage of Section 1605(a)(7) that victims of torture would have the right to file claims against state sponsors of terrorism. As petitioners correctly note, Section 1605(a)(7) is replete with a number of features that evidence Congress's intent that victims would be able to file lawsuits against a foreign country. Pet. at 15-16. For example, Section 1605(a)(7) has its own statute of limitations provision: "No action *shall be maintained under subsection (a)(7)* unless the action is commenced no later than 10 years after the date on which the cause of action arose." 28 U.S.C. § 1605(a)(13) (emphasis added). An action "maintained under subsection (a)(7)" presupposes that it was filed under that subsection to begin with.

At a minimum, there can be no doubt that Section 1605(a)(7), read in tandem with Section 1606's "shall be liable" provision, provides victims with such a cause of action. For example, breach of contract and similar lawsuits are filed by American companies under Section 1605(a)(2)'s "commercial activities exception" to the

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international law if needed. *See* Pet. App. G at 205a-212a. Three of these causes of action remain viable even if *Cicippio-Puleo* were correctly decided. The court of appeals' conclusion that petitioners "failed to state a cause of action" under the liberal rules of pleading was truly remarkable and clearly erroneous.

immunity of foreign states without the necessity of invoking an additional companion federal statute providing for a cause of action for such injuries. Rather, courts simply use the law that emerges from a conflicts of law analysis or of the law of the country agreed to in a forum selection clause of the contract in issue as the rule of liability. *See, e.g.*, *Saudi Arabia v. Nelson*, 507 U.S. 349, 374 (1993); *Bettis v. Islamic Republic of Iran*, 315 F.3d 325, 332 (D.C. Cir. 2003) (both cases citing to *First Nat'l City Bank* that ruled "where state law provides a rule of liability governing private individuals, the FSIA requires application of that rule to foreign state in like circumstances.").

In the same vein, no additional cause of action or source of law is needed by petitioners to bring claims sounding in tort against a foreign country for acts of torture. The common law torts of assault, battery, and intentional infliction of emotional distress suffice.

Indeed, the legislative history of Section 1605(a)(7) is replete with language that demonstrates Congress's clear understanding and intent that by lifting immunity, lawsuits against state sponsors of terrorism would be allowed to proceed. There is absolutely no evidence that Congress believed that an additional statutory cause of action would be necessary to enable victims to take advantage of its provisions.

As petitioners noted, statements by prominent sponsors and advocates of the early versions of Section 1605(a)(7) to the FSIA made it clear that Congress intended to give victims of terrorism a right for the explicit purpose of striking back at the state sponsor of terrorism that injured them, rather than a hollow remedy. Pet. at 16, n.3 (citing

to, *inter alia*, statements by Senator Specter and Representatives Fox, Ros-Lehtinen, and Hyde to the effect that Section 1605(a)(7) would give victims the right to sue terrorist countries and obtain money judgments).

The House Judiciary Committee that first considered the Section 1605(a)(7) amendment to FSIA discussed the applicability of the original amendment in its report. "The amendments made by this Act shall apply to any cause of action arising *before*, *on*, or after the date of the enactment of this Act." H.R. REP. NO. 103-702, at 1 (1994) (emphasis added). The Committee could not have made it any clearer when it stated that the amendments would allow U.S. citizens who were victims of certain terrorist acts "to maintain a *federal cause of action* for damages against the foreign government involved." *Id.* at 2 (emphasis added). Congress thus expected the enactment would lift immunity from the foreign state defendant, allowing claimants to utilize already existing causes of action under state or common law. *See id.* ("Courts may look to state law for guidance as to which parties would be proper wrongful death claimants."); *id.* ("H.R. 934 would add a new exception to the FSIA which would allow U.S. citizens who are subjected to torture, summary execution, or genocide abroad by a foreign sovereign to bring suit in the United States against the foreign sovereign.").

Section 1605(a)(7) was proposed and considered again as part of the Comprehensive Antiterrorism Act of 1995. The House Judiciary Committee again explained that passage of the exception would allow suits to proceed:

> Also responding to the tragedy of the Pan Am 103 bombing is section 804, which would amend the

> Foreign Sovereign Immunities Act (28 U.S.C. § 1602, *et seq.*) to permit suits by U.S. nationals against foreign states in U.S. courts . . . seeking money damages for personal injury or wrongful death caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or providing material support or resources for such acts.

H.R. REP. NO. 104-383, at 62 (1995). The House Conference Report stated that the purpose of the legislation was "to prevent and punish acts of terrorism." H.R. CONF. REP. NO. 104-518, at 1 (1996). Indeed, the legislative "subtitle" of the Antiterrorism and Effective Death Penalty Act of 1996 is "An Act to deter terrorism, provide justice for victims, provide for an effective death penalty, and for other purposes." Pub. L. No. 104-132, 110 Stat. 1214.

In short, there can be no doubt that the Congress fully intended that Section 1605(a)(7) would allow victims of terrorism and torture to file civil lawsuits against the states that sponsor such acts.

3. *The Flatow Amendment*

Five months after enacting Section 1605(a)(7), Congress enacted the Flatow Amendment to further expand on the right of Americans to file civil lawsuits, and to expand the scope of available damages to include punitive damages.[11] As previously noted, the Flatow Amendment

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[11] In the 1997 Omnibus Consolidated Appropriations Act, "the 'Flatow Amendment' revised the FSIA to expressly provide that punitive damages were available in actions brought under the state-

provides that a foreign state's "officials, employees, and agents" "*shall be liable*" (just as a foreign country "shall be liable" under Section 1606) for those acts that (1) are committed "while acting within the scope of his or her office, employment or agency," and (2) result in the "personal injury or death" of a U.S. national. 28 U.S.C. § 1605 note (emphasis added).

It is true that the Flatow Amendment alone does not expressly provide for a cause of action against a foreign state and only refers to individuals. The court of appeals, however, incorrectly interpreted the Flatow Amendment as providing nothing more than a cause of action against a foreign official or agent in his or her *personal* capacity for support of terrorism. *Acree v. Republic of Iraq*, 370 F.3d 41, 48 (D.C. Cir. 2004). Clearly, state sponsors of terrorism are unlikely to be deterred by personal lawsuits against their officials or agents, and who are likely to be judgment proof. Officials in acting in their private capacity were already liable for such actions prior to the passage of the Flatow Amendment. *See* Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 note. Additionally, personal capacity suits against foreign government officials or agents do not require a waiver of foreign sovereign immunity. *Jungquist v. Sheikh Sultan Bin Khalifa al Nahyan*, 115 F.3d 1020, 1027 (D.C. Cir. 1997). So if the Flatow Amendment, a cause of action inserted within the FSIA, only provides for personal capacity suits against government officials, it would be completely superfluous. Furthermore,

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sponsored terrorism exception to immunity. This was done to ensure that the state-sponsored terrorism exception had a deterrent effect--the potential for substantial civil liability." H.R. REP. NO. 106-733, at 26 (2000).

if a cause of action were limited to suits against the officials only in their personal capacities, service of process upon those individuals would not likely be effected.

Accordingly, Congress would not have intended the Flatow Amendment to be an empty promise or mere redundancy in the law. Rather, it is clear that Congress intended that the amendment expand the reach of the law and the scope of damages; and through well-established principles of *respondeat superior* and Section 1606, the foreign country itself would be liable for the acts of its agents.

The court of appeals would have us believe a fiction: that Congress, deeply concerned with state-sponsored acts of terrorism, had taken great pains to set the stage on which victims could bring their torturers to justice; provided the venue for the drama (mostly in the District of Columbia); determined the timing of the event (through the enactment of a statute of limitations and the prerequisite of arbitration); identified the *dramatis personae*; and provided compensation for the heroes and heroines, and yet did not want the curtain to rise. The court of appeals rewrote Congress's script, changing the drama into a tragedy.

Congress is not in the business of enacting nullities, yet the judgment below transforms a comprehensive legislative scheme under which state sponsors of terrorism have no immunity from civil suits into one that effectively shields them from such suits. Congress either enacted a nullity or its comprehensive legislative scheme, enacted for the purpose of compensating victims and deterring state-sponsored terrorism, has been eviscerated by the court of appeals. Accordingly, this Court's review of the judgment

is crucial in providing much needed guidance to the court below and to dispel the confusion its ruling has created.

B. The Decision Below Threatens To Deprive The United States of Substantial Collateral Benefits In The War On Terror

Plaintiffs who have brought Section 1605(a)(7) cases are in a position to supply important intelligence to United States law enforcement officials from various agencies. For example, when Alisa Flatow was killed in 1996 in the Gaza Strip, Yassir Arafat denied the FBI's requests to enter the area for the collection of evidence. Lawyers representing the Flatow family were nevertheless able to travel to the scene and secured crucial evidence that was subsequently turned over to the FBI. This evidence assisted the FBI in building its case against Sami Al-Arian for his role in the United States in raising funds for the Palestinian Islamic Jihad, the group responsible for murdering Alisa Flatow, as well as other Palestinian terrorist organizations.

Plaintiffs' lawyers thus have the incentive and professional obligation to investigate and obtain evidence that might escape the attention of U.S. law enforcement agencies that are otherwise engaged. This collateral benefit from bringing civil lawsuits would be jeopardized if the judgment below were allowed to stand.

CONCLUSION

For the foregoing reasons and those provided by the petitioners, the petition for writ of certiorari should be granted.

Respectfully submitted,

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